(4)

No. 89-1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TENNESSEE SMALL GENERAL SERVICE CUSTOMER GROUP, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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1. Petitioners contend that the decision of the court of appeals improperly expands the filed rate doctrine as announced by this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), thereby emasculating the just and reasonable rate standard of the Natural Gas Act. 15 U.S.C. § 717c(a). Additionally, Petitioners contend that the decision below directly and significantly undermines the doctrine of judicial deference formalized in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1985), as earlier applied in cases specifically arising under the Natural Gas Act. *See, e.g., Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

Respondents Columbia Gas Transmission Corporation, *et al.*, do not genuinely contest these compelling reasons

for granting certiorari, but rather present arguments and accompany factual data that address erroneously the merits of the proceeding. Similarly, Respondents do not dispute that the Court of Appeals is divided on the interpretation of the critical "just and reasonable" rate provision and that this decision will have a profound nationwide impact on the natural gas industry and its regulation by the Commission. Pet. 15. Accordingly, Respondents have failed to demonstrate why review by this Court is not warranted.

2. As to their particular arguments, Respondents rely heavily on *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). Opp. 13, 17, 22, 26; PGCG Opp. 3, 11. The Court's overriding concern in *Maislin*, however, was that the negotiated lower rate, which the shipper sought to enforce, was *never* filed with, and thus was never found just and reasonable by, the Interstate Commerce Commission. In this proceeding, just the opposite occurred. In 1986, Tennessee filed its tariff rates and, after lengthy deliberations and careful consideration, both the presiding judge and the Federal Energy Regulatory Commission ("Commission") determined just and reasonable rates. Therefore, unlike in *Maislin*, here no violation of the filed rate doctrine occurred.

3. In addition to statutory and judicial deference claims, Petitioners also contend that the court of appeals erred in its application of the filed rate doctrine by confusing retroactive ratemaking with current ratemaking that utilizes allocation factors based on past purchasing actions. Respondents do not dispute that Tennessee and other interstate pipelines, consistent with the Natural Gas Act, employ this identical methodology today in their traditional, non take-or-pay, ratemaking. Respondents cite no decision of the Court addressing this bedrock ratemaking principle. Clearly, this issue raised by Petitioners is worthy of review by the Court.

4. Respondents are primarily those customers whose dramatic shortfall in purchases created the enormous take-or-pay liability confronting Tennessee. Pet. 19-21. Respondents devote considerable effort, albeit unsuccessfully, trying to dilute this factual finding of the judge, which was adopted by the Commission, and not reversed by the court below.[1] Furthermore, Respondents' continued refrain that two-thirds of the take-or-pay costs were estimated by Tennessee as attributable to reforming contracts for the future, Opp. 10, 19, 20, 21, 24 and 25, even if relevant, ignores the Commission's findings that any such estimate by the pipeline was arbitrary. *Tennessee Gas Pipeline Company*, 43 FERC ¶ 61,329 at 61,931 (1988). Pet. App. 154a. Because both these challenged findings of the Commission, the cost incurrence responsibility of Respondents and the arbitrary nature of Tennessee's estimate, are supported by substantial evidence, they are conclusive. 15 U.S.C. § 717r(b).

5. Respondents' extended discussion of the Commission's review and eventual elimination of pipeline minimum bills is irrelevant. Opp. 4-7. Although they rely on a separate decision of the lower court addressing Tennessee's minimum bill, Respondents fail to state that its elimination was specifically premised on the lower court's finding, inconsistent with its opinion here, that the Order No. 500 purchase deficiency methodology more closely matched cost incurrence with cost responsibility. *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1106 (D.C. Cir. 1989). Similarly, Respondents' allegation that other mechanisms are available for Tennessee's recovery of these costs, Opp. 23, 26 and PGCG 3, ignores the ex-

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[1] *Tennessee Gas Pipeline Company*, 43 FERC ¶ 61,329 at 61,930 ("allocating these costs on the basis of past purchase deficiencies links more closely cost incurrence with cost causation.") Pet. App. 151a; *Tennessee Gas Pipeline Co.*, 40 FERC ¶ 63,008 at 65,082 (1987) ("it is apparent that a decline in a customer's purchases from Tennessee translates directly to a decline in Tennessee's ability to meet its purchase obligations.") Pet. App. 76a.

press rejection of these purported "choices" by the presiding judge and the Commission on the grounds that they would not produce just and reasonable rates. *Tennessee Gas Pipeline Company*, 40 FERC ¶ 63,008 at 65,081 and 65,086 (1987) Pet. App. 72a and 85a; *Tennessee Gas Pipeline Company*, 43 FERC ¶ 61,329 at 61,930 (1988). Pet. App. 150a and 151a.

6. Finally, Respondents recite alleged inequities that *could* result from blind application of the purchase deficiency methodology. Opp. 16 n.23; PGCG Opp. 8-10. As Respondents concede, however, these alleged "inequities" are *not* before the Court *in this case* where the Commission, in applying the Policy Statement to the specific facts before it, ensured that no customer suffered extreme hardship and that only current customers would pay the pipeline's current costs included in its just and reasonable rates.

CONCLUSION

Petitioners and Respondents present to the Court two very different views of the Commission's jurisdictional responsibilities under its organic statute. For their part, Respondents interpret the judicially-created filed rate doctrine as preempting, rather than complementing, the just and reasonable rate standard of the Natural Gas Act. Adoption of Respondents' view leads to the irrational result that the expanded filed rate doctrine would be satisfied, while the statute itself would not.

Conversely, Petitioners contend that the filed rate doctrine is designed to protect the Commission's primary jurisdiction to fulfill its substantive statutory directive and approve only those rates that are just and reasonable. Whatever the outcome on the merits, the issues presented by Petitioners concern "[t]he fixing of 'just and reasonable' rates with the power attendant thereto [which is] the heart of the new regulatory system" and is worthy of review by the Court. *Federal Power Com-*

mission v. Hope Natural Gas Co., 320 U.S. 691, 611 (1944).

For the reasons set forth above and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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